

NO. **12 CI 0037 26**

JEFFERSON CIRCUIT COURT
DIVISION _____

KENTUCKY DERBY MUSEUM CORPORATION

PLAINTIFF

v.

FILED IN CLERKS OFFICE
DAVID L. NICHOLSON, CLERK

JEFFERSON CIRCUIT COURT
DIVISION TWELVE (12)

CM
STEVE W. CLEMENTS and
STEVE CLEMENTS CATERING, INC. *AM*

Serve: Steve W. Clements Individually
And as Owner of Steve Clements Catering, Inc.
1205 Old Harrods Creek Road
Louisville, KY 40223

6-2012
DEPUTY CLERK

DEFENDANTS

**VERIFIED COMPLAINT
FOR SPECIFIC PERFORMANCE AND DAMAGES**

*** **

Plaintiff, Kentucky Derby Museum Corporation (the "Museum"), a Kentucky corporation, by counsel and for its cause of action, states:

PARTIES

1. The Museum is a Kentucky corporation located at 704 Central Avenue, Louisville, Kentucky 40208.
2. Upon information and belief, Steve W. Clements ("Clements") is a Kentucky citizen and resident residing in Louisville, KY.
3. Steve Clements Catering ("Clements Catering") is a Kentucky corporation with its principal office located at 704 Central Avenue, Louisville, Kentucky 40208.

JURISDICTION AND VENUE

4. This Court has original subject matter jurisdiction over this matter pursuant to KRS 3A.010, as the amount in controversy exceeds its minimal jurisdictional requirements and Kentucky Derby Museum seeks injunctive relief.

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5. Venue is proper in this Court pursuant to KRS 452.450 because a substantial portion of all actions or inactions giving rise to the causes of action asserted herein occurred in Jefferson County.

FACTS COMMON TO ALL COUNTS

The Parties' Agreement

6. Clements is the President and one of two directors of Clements Catering.

7. The Museum and Clements Catering were parties to a Restaurant and Catering Agreement (the "Agreement") dated February 16, 2010. The Agreement commenced on January 1, 2010 and was to continue through January 1, 2013.

8. Pursuant to the Agreement, the Museum granted Clements Catering the exclusive right, with certain enumerated exceptions, to supervise, direct and control management of the Derby Café (the "Restaurant"), and to provide catering services for parties and events held in the Kentucky Derby Museum, including food and beverage service to exhibition areas, galleries, conference rooms, or any other Derby Museum spaces that may be used for catered functions.

9. In exchange for the right to operate the Restaurant and provide catering services for the Museum, Clements Catering was required to provide the Museum with compensation.

10. Per the Agreement's terms, as compensation, Clements Catering was required to remit to the Kentucky Derby Museum certain "compensation minimums," which were 12.5% of Net Gross Restaurant Receipts (excluding gross receipts from the sale of alcoholic beverages accounted for therein), 14% of its Net Gross Catering Receipts (excluding gross receipts from the sale of alcoholic beverages accounted for therein), and 20% of its Net Gross Alcohol Receipts.

11. The Agreement specifically defined Net Gross Catering Receipts as "gross

catering receipts, less state and local sales taxes and gratuity,” and further defined gross catering receipts as “gross amounts received for Catering Services, either for cash or credit, with the full amount of credit sales being reported as gross receipts in the month in which said credit sales are made.” Net Gross Alcohol Receipts included the gross receipts from alcohol sales at both catered events and the Derby Café restaurant located on the Museum’s premises, which Clements Catering was also engaged to operate by the Agreement.

12. The Museum would contract with a client reserving the Derby Museum for the rental charge. The client would enter into a separate contract with Clements Catering for the catering services for the event in question, meaning the Museum was not privy to the actual amounts Clements Catering invoiced to the customers.

13. To obtain payment for its services, Clements Catering required a deposit from each customer and then sent each customer an invoice for the catered event, taking payment per the invoice.

14. Per the Agreement, Clements Catering was then required to deliver, on or before the tenth day of each month, (i) an accounting of its immediate past monthly gross receipts and net gross receipts and (ii) a check payable to the Museum for the compensation minimums due the Museum.

The Accounting

15. The Museum discovered a discrepancy in the amount invoiced to customers by Clements Catering versus the amount remitted by Clements Catering to the Museum. It informally obtained the actual invoices Clements Catering sent to customers for six events, and found that the amounts invoiced to the customer did not match the gross catering and gross alcohol receipts reported to the Museum.

16. Per the Agreement, the Museum had the right to "inspect all books, records, and accounts of [Clements Catering] showing gross receipts and expense."

17. In addition, per the Agreement, if any inspection of Clements Catering's books reveals that Clements Catering understated its gross receipts or net gross receipts during any accounting period, Clements Catering is obligated to immediately pay the Museum any additional payments due and owing and any additional charges due pursuant to the Agreement.

18. Per the Agreement, should inspection of the books reveal that Clements Catering understated its gross receipts or net gross receipts during any accounting period, Clements Catering is obligated to pay the Museum a late fee equal to eighteen percent (18%) per annum on the balance due.

19. Per its right to inspect the books of Clements Catering, in June 2012, the Museum engaged Strothman & Company PSC to assist with a review of Clements Catering's books, records, and accounts. Strothman & Company was able to obtain 26 monthly compensation reports from February 1, 2010 through May 31, 2010 (the Museum was closed for February and March 2010), the corresponding checks Clements Catering remitted to the Museum, and the supporting invoices Clements Catering provided to the customer.

20. Strothman & Company learned that Clements Catering would create two invoices each month. One invoice reflected the actual billing to the customer while the second invoice was prepared to support the amount reported to the Museum on the monthly compensation reports.

21. Strothman & Company's review revealed that for April and May 2010, Clements Catering remitted to the Museum the full compensation minimums required under the Agreement.

22. However, beginning in June 2010, the net gross catering receipts and net gross alcohol receipts reported to the Museum were reduced at varying percentages.

23. From January 2011 through May 31, 2012, Clements Catering utilized a more systematic invoice reduction scheme. The net gross catering receipts and net gross alcohol receipts reported to the Museum were 66% of the amount invoiced to the customer, although a few invoices were reported at other percentages.

24. Additionally, Strothman & Company found that Clements Catering was not including all charges invoiced to the customer in its calculation of net gross catering receipts. While the Agreement specifically states that the only items excludable in net gross catering receipts are state and local sales taxes and gratuity, Clements Catering excluded items such as rentals, amenities, ice sculptures, charges for carving station attendant, charges for not meeting bar minimums, charges for additional party time, charges for bartenders, and charges for floral arrangements.

25. By reporting reduced net gross catering receipts and net gross alcohol receipts to the Museum, Clements Catering in turn reduced the amount of the compensation minimums that it paid to the Museum.

26. Strothman & Company concluded that Clements Catering underreported net gross catering receipts and net gross alcohol receipts by over \$780,000.00, resulting in a loss of over \$100,000.00 to the Museum through May 31, 2012.

27. In addition, the Museum is entitled to recover the 18% late fee set forth in the Agreement for Clements Catering's underreporting of its gross receipts or net gross receipts.

Termination of the Agreement

28. On June 26, 2012, the Museum met with Clements and informed him that it was

terminating the Agreement due to Clements Catering's failure to make the payments due the Museum under the Agreement pursuant to Section 3.03(i).

29. During this meeting, the Museum provided Clements with written notice of termination.

30. Since termination, counsel for the parties have been engaging in negotiations but have not been able to come to an entirely satisfactory resolution of the issues.

31. On June 29, 2012, Clements surrendered Clements Catering's license to serve alcoholic beverages on Museum premises to the Museum.

32. Clements also provided the Museum checks for portions of deposits for a number of events to take place in the future, but has not provided checks for all of the future events. Thus, the checks provided to the Museum cover only a portion of deposits Clements has received for future events at the Museum.

33. Additionally, Clements has not paid the Museum the fees associated with Net Gross Restaurant Receipts and catering events in June 2012.

Need for Injunctive Relief

34. The Museum believes that after the meeting on June 26, 2012, Clements left the Derby Museum premises with copies of client prospect information, which is information on prospective clients who received bids for catered events at the Derby Museum but who have not yet finalized their catering contract.

35. As these clients reserved space at the Derby Museum, and as a byproduct of that reservation inquired into catering services for their event, the Museum must have the ability to review, use, and copy the prospective client information in order to service those customers.

36. In addition, Clements Catering must be restrained from hindering the Museum's

performance of any contracts for already scheduled events or prospective events or interfering with the Museum's relationship with the clients in any way so that the Museum is able to provide service to those clients.

37. Further, the Museum is aware of over \$70,000.00 in customer deposits for events scheduled to occur at the Derby Museum between June 26, 2012 and June 2013, although it does not have an accurate accounting of those funds.

38. The checks provided to the Museum by Clements on June 29, 2012 do not cover the outstanding deposits.

39. As these deposits are intended for events to be held at the Museum, Clements and Clements Catering must first provide to the Museum an accurate accounting of all monies paid to Clements Catering as customer deposits for future events to be held at the Museum, whether by check, credit card, or in cash and then must either pay all customer deposits identified by the accounting over to the Museum or place them in a secured escrow account with a financial institution.

COUNT I – BREACH OF CONTRACT

40. The Museum incorporates herein by this reference the allegations contained in paragraphs 1 – 39 of this Verified Complaint.

41. The Agreement is a binding and enforceable contract.

42. Pursuant to the Agreement's terms, Clements Catering was required to deliver, on or before the tenth day of each month, (i) an accounting of its immediate past monthly gross receipts and net gross receipts and (ii) a check payable to the Museum for the compensation minimums due the Museum.

43. Beginning in June 2010, and in violation of the Agreement, Clements Catering

began underreporting its net gross catering receipts and net gross alcohol receipts reported to the Museum.

44. In turn, and in violation of the Agreement, Clements Catering began remitting checks for the compensation minimums due the Museum that failed to reflect the compensation minimums actually due the Museum.

45. Additionally, Clements has not paid the Museum the fees associated with Net Gross Restaurant Receipts and catering events in June 2012.

46. The Museum has been damaged in an amount over \$100,000.00 to date by Clements Catering's breach of the Agreement, in addition to the 18% late fee set forth in the Agreement.

COUNT II – FRAUD

Against Steve W. Clements and Steve Clements Catering, Inc.

47. The Museum incorporates herein by this reference the allegations contained in paragraphs 1 - 46 of this Verified Complaint.

48. Each month, from June 2011 through May 2012, Clements Catering delivered to the Museum (i) an accounting of its immediate past monthly gross receipts and net gross receipts and (ii) a check payable to the Museum for the compensation minimums due the Museum.

49. By delivering the accounting and check required by the Agreement's terms, Clements Catering represented each month that the accounting of its immediate past monthly gross receipts and net gross receipts was true and accurate and that the check for the compensation minimums reflected the true and accurate compensation minimums due the Museum.

50. In actuality Clements Catering's representations made each month from June 2010 through May 2012 were false.

51. The accountings rendered each month from June 2010 through May 2012 underreported Clements Catering's immediate past monthly net gross catering receipts and net gross alcohol receipts.

52. The checks for the compensation minimums remitted to the Museum each month from June 2010 through May 2012 failed to reflect the compensation minimums due the Museum per the Agreements' terms.

53. Clements Catering knew that its representations were false. In April and May 2010, Clements Catering remitted accountings and checks for compensation minimums that complied with the Agreement's express terms. Accordingly, Clements Catering demonstrated that it was aware of the Agreement's express terms and demonstrated compliance with those terms in April and May 2010.

54. The Museum did not know that Clements Catering's representations, made each month from June 2010 through May 2012, were false.

55. By rendering accountings each month from June 2010 through May 2012 that underreported Clements Catering's immediate past monthly gross receipts and net gross receipts and remitting checks for the compensation minimums that failed to reflect the compensation minimums due the Museum, Clements Catering intended to induce the Museum's acceptance and reliance upon those falsified accountings and incorrect checks.

56. The Museum relied upon Clements Catering's misrepresentations to its detriment, losing at least \$100,000.00 to date due to Clements Catering's misrepresentations, in addition to the 18% late fee set forth in the Agreement.

COUNT III – CONVERSION

Against Steve W. Clements and Steve Clements Catering, Inc.

57. The Museum incorporates herein by this reference the allegations contained in

paragraphs 1 – 56 of this Verified Complaint.

58. Pursuant to the Agreement's terms, Clements Catering was required to remit to the Museum on a monthly basis 14% of its net gross catering receipts and 20% of its net gross alcohol receipts for the immediately preceding month as compensation in exchange for the right to provide catering services for the Museum.

59. Accordingly, and per the Agreement, 14% of Clements Catering's net gross catering receipts and 20% of its net gross alcohol receipts constitutes property belonging to the Museum.

60. From June 2010 through May 2012, Clements Catering failed to remit to the Museum 14% of its net gross catering receipts and 20% of its net gross alcohol receipts for the immediately preceding month.

61. Clements Catering has retained a significant portion of its net gross catering receipts and net gross alcohol receipts even though this property belongs to the Museum per the Agreement.

62. Clements Catering has wrongfully exercised dominion and control over property belonging to the Museum by using these funds for its own purpose with no intention of returning the funds to the Museum, together with accrued interest.

COUNT IV – ATTORNEY'S FEES

63. The Museum incorporates herein by this reference the allegations contained in paragraphs 1 - 62 of this Verified Complaint.

64. Pursuant to the Agreement, "[i]n the event of the bringing of any action by either Party against the other arising out of or in connection with [the] Agreement or the enforcement thereof, or by reason of the breach of any terms, covenants or conditions of [the] Agreement on

the part of either Party, the Party in whose favor the final judgment shall be rendered shall be entitled to have and recover from the other Party reasonable attorney's fees to be fixed by the court which shall have rendered such judgment."

65. Accordingly, the Museum is entitled to recover its reasonable attorney's fees incurred in prosecuting this action.

COUNT V – PUNITIVE DAMAGES

66. The Museum incorporates herein by this reference the allegations contained in paragraphs 1 - 65 of this Verified Complaint.

67. The actions of Clements Catering as set forth herein were intentional, willful, wanton, reckless, malicious, and/or grossly negligent so as to entitle the Museum to an award of punitive damages.

WHEREFORE, Kentucky Derby Museum Corporation demands as follows:

1. A Temporary Injunction (a) directing Steve Clements and Clements Catering to turn over to the Museum all copies of existing and prospective client information in their possession; (b) restraining Steve Clements and Clements Catering from hindering the Museum's performance of any contracts for already scheduled events or prospective events or interfering with the Museum's relationship with the clients in any way; (c) directing Steve Clements and Clements Catering to provide to the Museum an accurate accounting of all monies paid to Clements Catering as customer deposits for future events to be held at the Museum, whether by check, credit card, or in cash, within 24 hours of the date of entry of an Order granting injunctive relief; and (d) directing Steve Clements and Clements Catering to either pay all customer deposits identified by the accounting over to the Museum or place them in a secured escrow

account with a financial institution within two (2) business days of the date of entry of an Order granting injunctive relief;

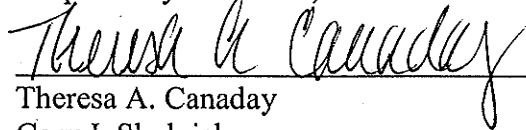
2. An award of compensatory damages in favor of the Museum and against Steve W. Clements and Clements Catering in an amount in excess of the minimum jurisdictional limit of this Court, the exact amount to be determined at trial;

3. An award of all attorney's fees and costs incurred in favor of the Museum and against Clements Catering;

4. An award of punitive damages in favor of the Museum and against Steve W. Clements and Clements Catering; and

5. Any and all other relief to which the Museum may appear entitled.

Respectfully submitted,



Theresa A. Canaday

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Counsel for Kentucky Derby Museum, Inc.

Courtesy copy provided July 6, 2012 to:

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